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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CLEOTILDE CHAVEZ, Plaintiff and Appellant, v. LIFETECH RESOURCES, Defendant and Respondent.	B282417 (Los Angeles County Super. Ct. No. BC588475)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Reversed and remanded with instructions.

Kashfian & Kashfian, Ryan D. Kashfian, Robert A. Kashfian and Shaun Kim for Plaintiff and Appellant.

Gordon Rees Scully Mansukhani, Calvin E. Davis, Christopher R. Wagner and Candice S. Nam for Defendant and Respondent.

INTRODUCTION

Appellant Cleotilde Chavez sued her former employer, respondent Lifetech Resources, LLC (Lifetech), alleging that Lifetech discriminated against her because of her physical disability in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, §12940 et seq.). In essence, Chavez claimed that Lifetech failed to engage with her to determine reasonable accommodations that would allow her to do her job as an assembly-line worker, failed to provide such accommodations, and then terminated her because of her disability. At trial, the jury agreed with Chavez that she was disabled and Lifetech knew of her disability, but found that her disability was not a substantial motivating reason for the termination. The jury further found in Lifetech's favor on Chavez's reasonable accommodation and interactive process claims. As such, the court entered judgment in favor of Lifetech on all claims.

Chavez moved for judgment notwithstanding the verdict and for a new trial. She argued, as relevant here, that the jury's verdict was not supported by substantial evidence and that several of the jury's findings on the special verdict form were fatally inconsistent. The trial court denied both motions. Chavez now appeals. We agree with Chavez that the evidence at trial and the jury's findings on the special verdict compel reversal and remand for a new trial.

FACTUAL AND PROCEDURAL HISTORY

I. *Chavez's Complaint*

Chavez filed her complaint on July 16, 2015, alleging five causes of action against Lifetech: (1) disability discrimination in violation of FEHA; (2) failure to provide reasonable accommodations in violation of FEHA; (3) failure to engage in good faith interactive process in violation of FEHA; (4) retaliation in violation of FEHA; and (5) wrongful termination in violation of public policy.[1] Chavez alleged that during her employment with Lifetech, she developed a "serious medical condition . . . including pain in her wrists and arms." She notified Lifetech of her condition and her need for reasonable

[1]Chavez later dismissed her retaliation claim.

accommodations because of her condition. Chavez further alleged that she took several brief leaves of absence in August and early September, 2013 to "procure medical treatment for her disability." When she returned to work, she continued to experience discomfort in her wrists and arms, but Lifetech "failed to engage in the interactive process with Ms. Chavez to determine a suitable accommodation." When she returned to work on September 10, 2013, Lifetech "fired her on the spot," telling her "in sum or substance that she was fired because she was purportedly 'too injured' to perform her duties." Chavez sought compensatory damages for her past and future lost wages, damages for her emotional distress, and punitive damages.

II. *Evidence at Trial*

A. *Lifetech*

Chavez worked in production at Lifetech as an assembly line employee. Lifetech has eight production lines, producing products such as cough syrup, eye drops, and face cream. All of the production line employees rotated through different positions, depending on which lines were in production that day. The various production lines moved at different speeds; some involved conveyor belts, while some used stationary tables. As an example of the types of jobs on one production line, one worker would take a bottle, fill it, and place it on the line. The next worker would place the cap on the bottle for the machine to tighten. At the end of the line, another worker would check the labels and place the bottle in a box or tray.

B. *Chavez*

Chavez testified that she started working for Lifetech as a temporary employee in August 2008. She was hired as a permanent employee in January 2009. She worked on the assembly lines, which included checking the labels on products, checking the plastic wrap on the boxes when they came out of the oven, inserting the instructions, and sealing the boxes; she also did some cleaning.

Chavez first experienced pain in her left wrist in early July 2013. Once the pain started "getting more intense," Chavez told her supervisor, production supervisor Mercedes Paredes, that her hand was hurting. Paredes said she would notify the office. Paredes did not ask Chavez about any limitations due to her injury. Chavez kept working. In the middle of

July, Chavez spoke to Paredes again, telling her that she now had pain in both wrists. Paredes again said she would inform the office. Chavez complained to Paredes about her wrists a third time toward the end of July. Although she complained about pain, Chavez never said she could not perform her job.

Chavez went to an urgent care doctor on August 12, 2013. The doctor told her that her injury was due to repetitive movement and prescribed an anti-inflammatory medication. Chavez testified that the medication helped her feel a little better. She went to work the following day and informed Paredes of the doctor's visit. Paredes moved Chavez to a different position—placing inserts into cough syrup boxes and closing the box tops. On August 19, Paredes asked Chavez how she was feeling. Chavez responded that she was feeling pain. The next day, a Tuesday, Paredes told Chavez to take the rest of the week off.

Instead of returning to work on the following Monday, August 26, 2013, Chavez went to back to the urgent care doctor, who told her to take another week off. Chavez called Paredes, who asked for the doctor's note. Chavez testified that she sent the note to work with her sister.

Chavez returned to work the following week, September 3, 2013. At that time, her wrists were feeling "a little better." She stated that she worked that week and did not complain to anyone about her wrists. She went to a specialist on Saturday, September 7, 2013, because although she was feeling a little better, she wanted to "see what was really wrong with my hands." Chavez was diagnosed with carpal tunnel syndrome. The specialist told her to take one day off from work and said he was going to give her some injections. He also said that Chavez was cleared to return to work with no restrictions.

Chavez stayed home from work on September 9, 2013 and returned to work the next day, September 10, 2013. She notified Paredes of her day off and provided her with the doctor's note when she returned. She worked a full day on September 10, packing products "into small boxes one-by-one and sealing the small box." She testified that she was able to perform her duties that day and did not complain about pain, even though her wrists hurt a little. At the end of the day, Chavez was called into the office to meet with

Paredes and Paredes's supervisor, controller Anna Carieri. According to Chavez, they told her there "was no longer more work for me" and that "I wasn't doing my job right." She asked them not to fire her and said she was happy working there. She also asked for "a little bit more time to fully recover so I could continue working." At that time, she had accrued about 255 hours of paid time off (PTO). Lifetech paid Chavez for her PTO (without deducting for the time she had taken off for her injury), paid her doctor's bill, and gave her two weeks' severance pay.

Chavez testified that no one at Lifetech ever asked about her limitations related to her wrist pain. She noted that there was one position she believed she could do that required only occasional use of her hands. In that position, the employee had to watch the cough syrup product pass along the conveyor belt and verify that each one had a plastic cover. If the cover was missing, the employee would pull that product and resend it through the line. Chavez admitted that this position was on a fast-moving assembly line, but stated that she had performed that position before her injury.[2]

Chavez again met with Paredes and Carieri in October 2013 to ask for her job back. Chavez claimed Paredes offered her an additional month's salary, and denied that she asked for more money. Lifetech also paid another doctor's bill. Paredes did not ask Chavez to sign a release.

After her termination, Chavez stated that her wrist pain improved gradually; by the beginning of 2014, she was feeling much better. She was able to find a part-time job cleaning homes in mid-2014, but has not found full-time work and has not worked on an assembly line since she left Lifetech. As of the trial in February 2017, Chavez stated she sometimes had "very slight pain" in her wrists.

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[2]Paredes disagreed with Chavez's assessment that this position required only occasional use of one's hands. Both Paredes and another production line employee, Francesca Mercado, testified that it would not work to put a slower employee into this position because that line moved at a very high speed, between 120 to 130 bottles per minute. In addition, Mercado testified that there were no assembly line jobs at Lifetech that did not require the use of one's hands.

C. *Paredes*

As production supervisor, Paredes was in charge of the production lines at Lifetech. She testified that before the injury, Chavez would handle shrink wrap, place inserts in boxes, and work on the packaging line. Chavez would also sometimes clean from 7:30 a.m. until her shift started at 8:00 a.m.; however, Chavez was no longer asked to do cleaning work after she reported her injury.

Chavez first told Paredes that her hand was hurting at the beginning of August. Paredes gave this information to her supervisor, Carieri. Carieri told Paredes to put Chavez on light duty and that Chavez "needed to rest." Paredes did not ask Chavez what limitations she had due to the pain.

Paredes moved Chavez to positions where she was placing inserts, or, depending on what production was running, placing plastic around bottles using her non-injured hand, which was "the easiest job I had for her." These were some of the same tasks Chavez had been doing before, but now she did not have to put the bottles on the conveyor and did not have to check the product.

Paredes testified that Chavez was a slow worker even before her injury. Paredes would try to find places where Chavez would "be more useful." She never wrote Chavez up for being slow, but would put Chavez on slower lines.

According to Paredes, after her injury began, Chavez was "constantly saying that she was in pain, that she was fine, and then again she was in pain, and again, that she was fine." Chavez was still able to do the job, but even more slowly than before. In mid-August, Chavez returned to Paredes and said that her tendons in her hands were swollen. Paredes informed Carieri, who said that Chavez should go home and rest the rest of the day. After that, Chavez called and said she was still in pain, so Carieri said she should take the rest of the week off. Although Chavez took an additional week off, Paredes stated that Chavez did not clear that with her and did not provide a doctor's note when she returned on September 3, 2013.

When Chavez returned on September 3, she said she was fine. Chavez told Paredes she was taking medication for her hands. That week, Chavez alternately said her hands were hurting and she was fine. Paredes testified that at some point she noticed Chavez grabbing boxes on the line instead of

just putting in the inserts. When she asked Chavez about it, Chavez responded that her hands were hurting whether she used them or not. Paredes also said that because Chavez was working even more slowly because of her pain, she would put her on the slowest production line; Paredes acknowledged that on the slow line, Chavez was able to perform her duties. She placed Chavez in the easiest positions based on what she thought was easiest, not based on asking Chavez what she could and could not do.

Chavez did not come to work on September 9. When she returned on September 10, she brought a doctor's note. Paredes asked Chavez how she was feeling, and she said okay. When Paredes gave the doctor's note to Carieri, Carieri said to keep Chavez on the lightest jobs. Paredes put Chavez to work that day putting an eyelash product and insert into the unit carton. It required both hands, but was the only job that day that did not involve "a lot of weight or lifting weight or doing difficult things." A few hours into her shift, Chavez said her hands were hurting. According to Paredes, Chavez alternated several times that day between saying she was fine and then that she was in pain. Paredes reported to Carieri that Chavez was still in pain. Carieri responded to "keep watching her, and to make sure that she was doing her work slow, and not to carry too much weight, and do the easy jobs."

Later that day, Carieri told Paredes to call Chavez into the office. Paredes testified that Chavez was not able to perform her duties, because "[h]ow can you carry out a job if you're still doing it with pain?" She also felt Chavez was not performing "the way a person should be doing it" because she was not producing enough. Paredes told Carieri that Chavez "made the production go slower" and was still complaining of pain. When they met with Chavez, Paredes interpreted for Chavez (who spoke Spanish) and Carieri (who spoke English). Carieri told Chavez she could not work there anymore because she "couldn't perform her duties," citing Chavez's alternating complaints. Chavez responded that she was fine. Carieri reiterated that Chavez was being let go.

D. *Carieri*

Carieri worked as Lifetech's controller and also handled some human resources issues for the company. She testified that she learned from Paredes in early August that Chavez was having hand pain. She told

Paredes to put Chavez on "the lightest work possible," to be determined by Paredes.

Carieri did not send Chavez to the doctor for her injury because Chavez did not report that it occurred at work. Instead, she sent Chavez home to rest with pay. Carieri acknowledged that when Chavez returned on September 3, 2013, she was able to do the light duty she was given. That week, Chavez was "doing her tasks and would complain off and on of some discomfort." Carieri had noticed Chavez was slow even before the injury, but Lifetech was "okay that she was a slow worker." Paredes did tell Carieri after the injury that Chavez was working "a little slower" than her usual pace. However, Carieri testified that there were no complaints about Chavez's slowness and agreed that, if slowness was an issue, she or Paredes would have had a discussion with the employee.

On September 10, Chavez came to work with her doctor's note, which cleared her to work without restrictions. Carieri testified that Chavez alternated between having pain and not having pain, "back and forth all day." After Paredes reported that Chavez was still having pain, Carieri spoke to senior management "and then I came to the determination that [Chavez] was not able to perform the tasks, after a medical note clearing her to work without restrictions, that she was fine to work, and I decided to end her working with us." Carieri admitted she did not know about the law in California regarding disabled employees or what the interactive process was. She made the decision to terminate Chavez without knowing whether she was covered as disabled or what was required under the law. Carieri also testified that she did not think Chavez was disabled, because while Chavez had "pain and discomfort," Carieri considered a disability to be "much more extreme, where a doctor would give you a note saying you're no longer able to work." Lifetech also employed a human resources consultant, but Carieri did not speak to the consultant when deciding to terminate Chavez.

Carieri stated that she did not consider giving Chavez additional time off through personal time or PTO to recuperate, because she "didn't think it would help." Carieri agreed that Chavez was able to perform her essential job functions, even though she was slow. However, during examination by Lifetech's counsel, she testified that Paredes told her Chavez was slowing

down production, and her performance "wasn't what we needed in order to make our output, satisfy our customer orders." She did not discuss with Chavez that she was slowing down production. In deciding to terminate Chavez, she considered Chavez's complaints about hand pain and that she was slowing down production. Carieri stated that Lifetech "did everything we could to accommodate" Chavez.

E. *Admissions*

Both parties relied on various discovery responses during the trial. In particular, Chavez relied on two responses by Lifetech to her requests for admissions. In request number 26, she asked Lifetech to admit "that at the time of PLAINTIFF'S TERMINATION, YOU perceived PLAINTIFF as being disabled." Lifetech provided a qualified admission that it "was on notice of Plaintiff's wrist pain as of the date of Plaintiff's termination." In response to request number 27, Lifetech admitted without objection that it "did not TERMINATE PLAINTIFF'S EMPLOYMENT due to any performance issues." Lifetech's discovery responses were verified by Carieri. After Carieri testified that she terminated Chavez because she was "not able to perform," Chavez's counsel asked why Carieri verified the admission that the termination was not because of performance. Carieri responded, "I could have made an error. I didn't read it or missed it."

F. *Other evidence*

In support of her claim for emotional distress, Chavez testified that she was sad and depressed, and was unable to sleep for about two years following her termination. Her adult sons also testified about her emotional distress. Chavez also called a psychologist, Dr. Barry Halote, who evaluated her in January 2017. He opined that Chavez suffered from anxiety and depression after her termination. During cross-examination, Dr. Halote discussed additional results from Chavez's psychological testing, including a high score on the scale for hypochondriasis, which he described as "an overconcern about somebody's physicality," and on the scale for hysteria. He disagreed with defense counsel's suggestions as to the import of these results, including the defense argument that Chavez was exaggerating or imagining her symptoms.

III. *Verdict and Plaintiff's Post-trial Motions*

The jury returned a verdict in favor of Lifetech on all causes of action. The jury completed the special verdict form, in pertinent part, as follows: first, on the claim for disability discrimination, the jury found that Lifetech knew Chavez had a physical disability and was able to perform the essential job duties with reasonable accommodation for her disability. However, the jury found that Chavez's disability was not a substantial motivating reason for Lifetech's decision to terminate her employment. Accordingly, the jury found in favor of Lifetech on Chavez's claims for disability discrimination and wrongful termination in violation of public policy. Second, on the claim for failure to provide reasonable accommodation, the jury found that Chavez had a physical disability, Lifetech knew of that disability, and Chavez was able to perform her essential job duties with reasonable accommodation. But the jury also found that Lifetech did not fail to provide reasonable accommodation. Thus, the jury found in favor of Lifetech on the reasonable accommodation claim. Finally, on the claim for failure to engage in an interactive process, the jury found that Chavez had a physical disability. However, the jury found that Lifetech was not aware that Chavez "required reasonable accommodation for her physical disability so that she would be able to perform the essential job requirements." Thus, the jury found in favor of Lifetech on the interactive process claim. The trial court entered judgment for Lifetech on February 22, 2017.

Chavez filed a motion for judgment notwithstanding the verdict and a motion for a new trial, asserting many of the same arguments she raises on appeal, among others. Lifetech opposed both motions.

The court heard argument on the motions on April 21, 2017. The court noted that it was "a troublesome case to analyze," because the reasons given by Lifetech for the termination were closely tied to Chavez's injury. Following argument, the court took the matter under submission.

On April 24, 2017, the court issued a written order denying both motions. The court determined there was a "unifying theme" to the jury's findings on the special verdict form: the conclusion that "Lifetech reasonably attempted to accommodate Chavez's disability (the reasonable accommodation finding) but terminated her when those efforts simply were

not successful in enabling her to be a contributing employee (the remaining causes of action)." The court found these conclusions were supported by substantial evidence. We discuss the court's findings in further detail in the relevant sections below.

Chavez timely appealed.

DISCUSSION

I. *Claims for Discrimination and Wrongful Termination*

Chavez contends that substantial evidence does not support the jury's verdict on her first cause of action for disability discrimination and her fifth cause of action for wrongful termination in violation of public policy. In returning a verdict for Lifetech on both claims, the jury found that Chavez's disability was not a substantial motivating reason for her termination. Chavez argues this determination was not supported by the evidence at trial, given witness testimony regarding the reasons for the termination and Lifetech's admission that the termination was not based on performance issues. The trial court found that Lifetech's admission was limited to certain types of performance issues, and therefore the jury's verdict could stand. We conclude there was no basis in the record for the jury or the court to limit Lifetech's admission, and consequently the jury's finding regarding the reasons for termination was not supported by substantial evidence.

A. *Standard of review*

We review claims that insufficient evidence supports a jury verdict under the substantial evidence standard. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) "'[T]he power of [the] appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the [verdict].'" (*Ibid*.) "Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible and of solid value. We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. We affirm the judgment if an examination of the entire record viewed in this light discloses substantial evidence to support the judgment." (*Faigin v. Signature Group Holdings, Inc*. (2012) 211 Cal.App.4th 726, 736.)

B. *Background*

The jury was instructed using CACI No. 2540 on the following essential elements of disability discrimination: (1) that Lifetech was an employer; (2) that Chavez was an employee of Lifetech; (3) that Lifetech knew that Chavez had a disability; (4) that Chavez "was able to perform the essential job duties with reasonable accommodation for her disability"; (5) that Lifetech discharged Chavez; (6) that Chavez's disability was a substantial motivating reason for Lifetech's decision to discharge Chavez; (7) that Chavez was harmed; and (8) that Lifetech's conduct was a substantial factor in causing Chavez's harm. The first, second, and fifth elements were not in dispute. Further, the jury found in favor of Chavez on the third and fourth elements—that Lifetech knew she had a physical disability that limited the use of her hands and that she was able to perform the essential job duties with reasonable accommodation for her disability. But the jury found in favor of Lifetech on the sixth element, marking on the special verdict form that Chavez's disability was *not* a substantial motivating reason for her termination.[3]

The jury was also instructed using CACI No. 210 on requests for admissions: "Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them."

At the hearing on her motion for judgment notwithstanding the verdict and for new trial, Chavez's counsel pointed to Lifetech's admission that Chavez was not fired for performance issues and Carieri's testimony acknowledging that working slowly and not being able to perform the tasks were performance issues. Consequently, he argued that "if performance is out, then the termination was strictly because of her disability." The court acknowledged Lifetech's admission, but concluded that "[i]n the context of this case, however, the Court agrees with Lifetech that this response must be

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[3]Chavez's wrongful termination claim also required a showing that discrimination on the basis of her disability was a substantial motivating reason for her discharge. (See CACI No. 2430.) Once again, the jury found in favor of Lifetech on that element.

construed to mean performance issues such as attendance and timeliness, rather than the inability to work due to wrist pain that has been obviously the contested issue throughout this case, including through the trial testimony. Before or during trial, plaintiff (apparently, at least to the Court's recollection and the current briefing) did not argue that the admission precluded defendant from introducing evidence or arguing that plaintiff's inability to perform in August and September 2013 led to her termination." Accordingly, the court concluded that "there was substantial evidence for the jury to conclude that the disability itself was not a substantial motivating reason to terminate Chavez."

C. *Analysis*

Chavez argues that Lifetech's admission that it "did not terminate plaintiff's employment due to any performance issues" precluded the jury from finding otherwise. Lifetech has not argued otherwise below or on appeal. However, in denying Chavez's post-trial motions, the trial court limited the scope of the admission to "performance issues such as attendance and timeliness." We find this conclusion was not supported by the evidence.

"A matter admitted in response to a request for admission is conclusively established against the party making the admission, unless the court has permitted amendment or withdrawal of the admission. (Code Civ. Proc., § [2033.410].) Section 2033[.300] permits a party to withdraw or amend an admission with leave of court." (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1272 (*Valerio*).)

In *Valerio, supra*, 103 Cal.App.4th 1264, 1266, a general contractor (Birtcher) and subcontractor (Valerio) disputed the existence of a written contract between them. Valerio responded to a request for admission by admitting certain provisions as required under the written contract. (*Id*. at p. 1268.) Although Birtcher argued in pretrial briefs that Valerio was bound by his admissions, Valerio did not seek to amend his discovery responses. (*Id*. at pp. 1268-1269.) The trial court concluded that there was no contract, finding that requests for admission were "ambiguous and are not binding on Valerio on the critical question of whether the contract was entered into." (*Id*. at p. 1269.) The court of appeal reversed, finding that the trial court "erroneously ignored the effect of Valerio's admissions made pursuant to Code of Civil

Procedure section 2033." (*Id.* at p. 1272.) Because Valerio made no request to amend or withdraw his admissions, "Birtcher was entitled to rely on those admissions." The court also rejected Valerio's argument that the trial court had discretion to narrow the scope of the admissions: "In those cases in which the court determines that an admission may be susceptible of different meanings, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence. . . . [Here, however,] there was no ambiguity in Valerio's understanding at the time he responded to the requests for admissions. . . . Accordingly, there was no reason for the court to interpret the admission in order to resolve an ambiguity or reflect Valerio's reasonable understanding of the facts." (*Id.* at p. 1273.)

Similarly, here, Lifetech responded to Chavez's request for admission with an unqualified admission that it did not terminate Chavez due to "any performance issues." It did not preface that admission with any objections, nor did it qualify the admission in any way. Moreover, Lifetech never moved to amend or withdraw the admission, even when Chavez admitted it into evidence at trial and then questioned Carieri about it. Nor has Lifetech offered any support for the court's conclusion that the admission was limited in scope. Nor have we found any in the record. The jury was instructed that it had to accept any party admissions as true. There was no evidence at trial from which the jury could have construed the admission regarding "any performance issues" as limited to attendance and timeliness issues. Indeed, Carieri—who undisputedly made the decision to terminate Chavez—testified that she made that decision because Chavez "was not able to perform the tasks of her position," and agreed that was "a performance issue."

Further, neither Lifetech nor the trial court cited any evidence supporting a conclusion that the admission could be susceptible to different meanings, or was understood differently by Lifetech. Lifetech was aware that it could offer a qualified admission, as it did in response to other requests. As such, we agree with the court in *Valerio* that "[w]hile the result here is rigorous, the rule is clear and [Chavez] is entitled to rely upon it. To hold otherwise would undermine well-settled rules of pleading relied upon to properly structure litigation. [Lifetech] failed to take the necessary

procedural steps to remove [its] judicial admissions" and it was error for the court to find otherwise. (*Valerio, supra*, 103 Cal.App.4th at pp. 1273-1274.)

In light of this admission, the jury could not consider Lifetech's evidence that it based its decision to terminate Chavez for any performance issues. Crucially, this would include the testimony by Carieri that she considered the fact that Chavez was slowing down production. The other reason given by Carieri at trial for the termination was Chavez's continued complaints about hand pain. Chavez argues that therefore the only basis for the termination the jury could consider was her disability; thus, the jury lacked substantial evidence to find that her disability was not a substantial motivating factor in her termination.

Lifetech counters that Chavez has constructed a "false dilemma" because there are additional explanations for the termination. It posits that the jury could have found Chavez was disabled at an earlier time, but not at the time of her termination. This argument ignores the jury's findings on the special verdict form that Chavez was disabled, that Lifetech knew she was disabled, and that she was able to perform the essential duties of her position with accommodation. It also ignores the evidence at trial, including testimony by Carieri and Paredes that they knew Chavez's wrists were still hurting on the day she was terminated, as well as Lifetech's admission that it "was on notice of Plaintiff's wrist pain as of the date of Plaintiff's termination." During trial, Lifetech's counsel further stated that Lifetech stipulated that it was on notice of Chavez's disability at the time of termination, and therefore Chavez did not need to "ask [Carieri] about it."

Lifetech also argues that the jury could have found Chavez's termination was not discriminatory because Chavez could not perform her essential duties "in a manner that would not endanger the employee's health or safety . . . even with reasonable accommodations," citing section 12940, subdivision (a)(1). But Lifetech forfeited this argument by failing to raise it at trial; moreover, the jury was not instructed on it. Within the parameters of the evidence presented at trial and the instructions provided to the jury, we conclude the jury lacked substantial evidence to conclude that Chavez's disability was not a substantial motivating factor in Lifetech's decision to terminate her.

We therefore reverse the judgment as to Chavez's first cause of action for discrimination and fifth cause of action for wrongful termination in violation of public policy.

II. *Claims for Failure to Provide Reasonable Accommodation and Failure to Engage in Interactive Process*

Chavez argues that the jury reached inconsistent verdicts on her second cause of action for failure to provide reasonable accommodation and her third cause of action for failure to engage in a good faith interactive process. She contends that this inconsistency requires reversal of the judgment and a new trial on these claims. We agree.[4]

A. *Standard of review*

"A special verdict is inconsistent if there is no possibility of reconciling its findings with each other." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357 (*Singh*).) If no party requests clarification of an apparent inconsistency or an inconsistency remains after the jury returns, "the trial court must interpret the verdict in light of the jury instructions and the evidence and attempt to resolve any inconsistency. [Citations.]" (*Id.* at p. 358; see also *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 (*Wysinger*) ["Where special verdicts appear inconsistent, if any conclusions could be drawn which would explain the apparent conflict, the jury will be deemed to have drawn them."].)

"On appeal, we review a special verdict de novo to determine whether its findings are inconsistent. [Citation.] With a special verdict, unlike a general verdict or a general verdict with special findings, a reviewing court will not infer findings to support the verdict. [Citations.] 'Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.' [Citations.] 'The appellate court is not permitted to choose between inconsistent answers.' [Citations.]" (*Singh, supra*, 186 Cal.App.4th at p. 358; *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 ["there is no presumption in favor of upholding a special verdict when the

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[4]We therefore need not reach Chavez's alternative argument that the jury's verdict on the third cause of action was not supported by substantial evidence.

inconsistency is between two questions in a special verdict"].) The proper remedy for an inconsistent special verdict is a new trial. (*Ibid.*; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344.)

B. *Background*

Under the FEHA, it is unlawful for an employer "to fail to make reasonable accommodation for the known physical or mental disability" of an employee unless the employer demonstrates doing so would impose an undue hardship. (§12940, subd. (m).) The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256.) The jury was instructed on these elements using CACI No. 2541.

"[A] reasonable accommodation can include providing the employee accrued paid leave or additional unpaid leave for treatment ..." provided it is likely that, at the end of such leave, the employee will be able to perform his or her employment duties. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 (*Hanson*); *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058–1059.) An employer is not required to choose the best accommodation or the specific accommodation the employee seeks. Instead, ""the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." [Citations.]" (*Hanson, supra*, 74 Cal.App.4th at p. 228.)

The FEHA also requires an employer to engage in a "good faith, interactive process" with an employee to determine an effective reasonable accommodation if an employee with a known physical disability requests one. (§12940, subd. (n).) A failure to engage in the interactive process claim is a separate, independent claim requiring proof of different facts. (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 463-464 [citing *Wysinger, supra,* 157 Cal.App.4th at p. 424].) The purpose of the interactive process is for the employer and employee to work together "to explore the alternatives to accommodate the disability." (*Wysinger*, *supra*, 157 Cal.App.4th at p. 424;

see also *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 242 [*Claudio*] [interactive process used "to determine effective reasonable accommodations"].) Here, the jury was instructed on the interactive process claim using CACI No. 2546.

On the special verdict form for the second cause of action for failure to provide reasonable accommodation, the jury found that Chavez had a physical disability, Lifetech knew she had a disability that limited the use of her hands, and Chavez was able to perform the essential job duties with reasonable accommodation for her physical disability. However, the jury concluded that Lifetech did not fail to provide reasonable accommodation for Chavez's disability, therefore returning a verdict for Lifetech on that claim. For the third cause of action for failure to engage in interactive process, the jury again found that Chavez had a disability. But on the special verdict form in response to the question whether Lifetech was "aware that Cleotilde Chavez required reasonable accommodation for her physical disability so that she would be able to perform the essential job requirements," the jury marked "No." The jury therefore returned a verdict for Lifetech on the third cause of action as well.

At the hearing on her post-trial motions, Chavez's counsel argued that "the mere fact that [Lifetech] provided one accommodation does not absolve them of liability" for a continuing failure to engage in the interactive process if that accommodation was unsuccessful and there were other possible accommodations available. Lifetech's counsel responded that evidence about what accommodations could have been given were properly put before the jury, and the jury agreed with Lifetech. The court asked Lifetech's counsel about the jury's finding that Chavez was able to perform the essential functions of the job with reasonable accommodation, and Lifetech's counsel responded that he thought the jury was looking at "different time frames that were presented in the case," and that while the jury may have found Chavez could perform during some period, ultimately, it concluded that those accommodations did not last and "there was nothing else to do." As to the interactive process, he argued that the jury found that "Lifetech had satisfied that obligation [to provide reasonable accommodation] and there was no more accommodation process for it to be aware of."

The court agreed with Chavez's counsel "in a broad sense" that a defendant who was found to have reasonably accommodated an employee could nevertheless be liable for an ongoing failure to engage in the interactive process, but limited to instances where "the employee can identify a reasonable accommodation that would have been revealed through the interactive process but was not otherwise apparent." The court then concluded that Chavez's argument that the verdicts on counts two and three were inconsistent was an "implausible interpretation" of the special verdict. The court reasoned, "the jury obviously concluded that Lifetech was aware of the need to provide a reasonable accommodation, as it found it actually *did* provide one." As to the jury's seemingly inconsistent finding on count three that Lifetech was not aware that Chavez required reasonable accommodation for her disability, the court continued: "Another interpretation of the jury's answer [to that question] is that the jury concluded that because reasonable accommodations did not succeed in enabling Chavez to perform the essential job requirements, Lifetech was not aware that they would do so. That is, Lifetech had satisfied that obligation, and there was no more accommodation process for it to be aware of."

C. *Analysis*

Chavez contends that the jury's findings on count two are fatally inconsistent with its findings on count three. On the former, the jury found that Lifetech knew of Chavez's disability and Chavez was able to perform the essential duties of her job with reasonable accommodation. Conversely, on the latter, the jury found that Lifetech was not aware that Chavez required reasonable accommodation. Because these material findings conflict, Chavez argues both counts must be reversed.

The court made such a finding in *Singh, supra*, 186 Cal.App.4th 338. There, the plaintiff alleged that defendants induced him to relocate from India to California for employment with false promises regarding a salary, length of employment, and assistance with his application for permanent residency. The jury returned a special verdict finding that defendants "(1) had in fact made no promise to employ Singh for a period of three years or to sponsor him for permanent residency, (2) had made no important promise that they had no intention of performing at the time the promise was made,

and (3) had not misrepresented the kind, character, or existence of work." (*Id.* at pp. 350, 359.) The court found those findings "are inconsistent with and cannot be reconciled with the jury's other findings that defendants had intentionally or recklessly misrepresented an important fact and intentionally concealed an important fact," where all of the findings were premised on the same alleged misrepresentations or concealments. (*Id.* at p. 359.) Thus, the court concluded that "[t]he appropriate remedy is to reverse the judgment for a new trial on the affected counts." (*Ibid.*)

By contrast, in *Wysinger, supra*, 157 Cal.App.4th at p. 419, the jury returned a special verdict finding, in pertinent part, that (1) the employer did not fail to provide a required reasonable accommodation to Wysinger; but (2) the employer did fail to engage in an interactive process regarding his disability. On appeal, the defendant argued that the verdicts were inconsistent. (*Id.* at p. 424.) The court of appeal disagreed, noting that the verdicts involved "separate causes of action and proof of different facts. . . . Here the jury could find there was no failure to provide a required accommodation because the parties never reached the stage of deciding which accommodation was required. [The defendant] prevented this from happening by its refusal to engage in the interactive process." (*Id.* at pp. 424-425.)

Thus, in *Wysinger*, the verdicts involved opposing findings on the ultimate issue in each claim, namely, whether the defendant provided reasonable accommodation and whether it engaged in an interactive process. Under those circumstances, the *Wysinger* court was able to reconcile the jury's verdicts. On the other hand, here, the jury found on count two that Chavez was disabled and could perform her duties with reasonable accommodation, but found on count three that Lifetech was not aware that Chavez required reasonable accommodation. These findings were based on the same underlying conduct. The jury's findings on those counts are plainly inconsistent and irreconcilable. The trial court attempted to reconcile the verdict by inferring findings and drawing conclusions of ultimate fact. This was in error. (See *Singh, supra*, 186 Cal.App.4th at p. 358; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 ["A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall

remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)"].)

We also find no support for Lifetech's suggestion that the jury could have found both that "Lifetech made appropriate efforts to 'provide a reasonable accommodation'" in support of count two and that Lifetech did not know that "'Chavez *required* reasonable accommodation.'" Lifetech provides no support for this argument. Moreover, it conflicts with the jury's express findings that Chavez had a disability and that Lifetech knew of that disability, as well as the evidence that Lifetech provided some accommodations and that those accommodations were not successful, given that Chavez continued to complain of pain. Under these circumstances and based on the other findings in the special verdict, there was no substantial evidence from which the jury could have concluded that Lifetech did not know that Chavez required reasonable accommodation. Accordingly, the verdicts on counts two and three are materially inconsistent and the appropriate remedy is reversal of both counts.

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial. Chavez is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

DUNNING, J. *

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* Retired Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.